Cox Fire Protection, Inc. *and* Sprinkler Fitters U.A. Local 821, AFL–CIO. Case 12–CA–13389

September 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 30, 1991, Administrative Law Judge William F. Jacobs issued the attached decision. The Charging Party filed exceptions and the Respondent filed a brief in response to those exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this decision and to adopt the recommended Order as modified.

The judge found that the Respondent did not violate the Act when the Respondent's owner, Ron Cox, on receiving the Union's charge against the Respondent alleging various violations of the Act, told employee Frank Husted, in the presence of several other employees, ''This isn't a threat, but I want to kick your ass.'' The judge found that Cox was merely expressing in anger what he would like to do, but would not do, to Husted, and therefore, as he made clear to Husted, he was not threatening him. The Charging Party has excepted to these findings. We find merit in its exceptions.

The test is not one of intent, as the judge's findings suggest, but whether the threatened conduct has the tendency to interfere with, restrain, or coerce the employees in the exercise of their Section 7 rights. Here, Cox threatened Husted immediately on reviewing the unfair labor practice charge filed against the Respondent alleging, inter alia, that it had unlawfully suspended Husted. Whether Cox meant his statement to be taken literally or merely as a colorful figure of speech used to express his feelings, the clear import of Cox's statement was that he wanted to retaliate against Husted because he believed that Husted was responsible for filing the charge.[3] In this regard, when Husted entered Cox's office and asked what was happening, Cox replied that Husted knew. Cox later called Husted ''two-faced'' and a ''liar.'' In addition, the record establishes that several employees were present in the office and had just read the union charge prior to Cox's threat to Husted.

Contrary to our dissenting colleague, we believe that, notwithstanding Cox's statement that ''this isn't a threat,'' Husted and the other listening employees could reasonably fear that Cox was clearly disposed to unfavorably exercising his authority as an employer against any employee involved in the protected activity of filing an unfair labor practice charge.[4] The fact that Cox did not elaborate on his metaphor by specifically mentioning ''forms of retaliation'' does not, in our view, significantly lessen the ominousness of the statement coming from a company owner whose control over the employees' job security was virtually total. Accordingly, we find that the Respondent, on May 25, acting through Cox, violated Section 8(a)(1) by threatening Husted.[5]

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the following findings of the judge: that the Respondent's foremen are not supervisors within the meaning of Sec. 2(11) of the Act and are eligible to vote in any representation election; and that the Respondent violated the Act by interrogating employees about their union activities, threatening plant closure because of employees' union activities, threatening to blackball employees who support the Union, soliciting employees assistance to obtain employee withdrawal of union authorization cards, and soliciting an employee to sign a petition to withdraw union authorization cards.

[2] In agreeing with the judge's finding that employee Husted was not constructively discharged, we rely on *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), in which the Board held that in order to establish a constructive discharge, it is necessary to prove (1) ''that the burdens imposed on the employee 'must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force [him] to resign,''' and (2) ''that these burdens were imposed because of the employee's union activit[ies].'' See also *Red Arrow Freight Lines*, 289 NLRB 227 (1988). Here, we find that these two elements have not been proven and, accordingly, affirm the judge's recommendation.

Further, in agreeing with the judge's finding that the suspension of Husted on May 15, 1989, was not unlawful, we do not rely on the judge's observation that the lack of animosity between Cox, the Respondent's owner, and Husted is suggested by the fact that Husted invited Cox and his family over to his home for a cookout.

[3] That the complaint allegation is phrased as a threat of physical harm rather than as one of reprisal, is immaterial. The latter threat clearly is encompassed within the former.

[4] As we note above, the test for an 8(a)(1) threat is an objective one and Cox's actual motive is irrelevant. Because it is not clear that an employee would reasonably perceive Cox's anger as directed at Register's union sympathies rather than his ''gutter'' remark, we agree with the dismissal of this allegation.

[5] Member Oviatt also finds, contrary to the judge and his colleagues, that the Respondent, acting through Supervisor Noble, violated Sec. 8(a)(1) on May 10, 1989, when Noble told employee Register that he should take Register out and get him drunk so that Register would miss work the following day and Noble could then fire him, and on May 12, 1989, when Noble shoved Register several times and invited Register to hit him. In Member Oviatt's view, both of these incidents were unlawful because they constituted coercion directed toward Register because of his support for the Union. Noble's May 10 remark conveyed to Register the Respondent's wish that it could find an excuse to discharge him because of Register's union activiity, and Noble's May 12 physical confrontation with

Continued

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cox Fire Protection, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(e) and reletter the subsequent paragraphs.

''(e) Threatening employees with physical harm because of their union activities.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER RAUDABAUGH, dissenting in part.

Unlike my colleagues, I would affirm the judge's finding that the comments of Respondent owner Cox to employee Husted did not violate Section 8(a)(1).[1]

The evidence establishes that Cox made the comments immediately after receiving an unfair labor practice charge which, inter alia, named Husted as a discriminatee. Cox said to Husted, ''This isn't a threat, but I want to kick your ass.'' The issue is whether Husted would reasonably believe that Cox would physically assault him or take other reprisals against him. I do not believe that the General Counsel has established this point. In this regard, I note initially that Cox began by saying that he was *not* threatening Husted. Indeed, the fact that Cox is 5 feet 7 inches tall and Husted is 6 feet 4 inches tall and weighs 260 pounds would suggest that Husted could have no reasonable fear of an assault by Cox.

In apparent recognition of the fact that physical harm was neither threatened nor perceived, my colleagues suggest that Cox was referring to other, i.e., nonphysical, forms of retaliation. However, there is no evidence, either in Cox's remark or elsewhere, to support this contention. Indeed, the complaint alleges only a threat of physical harm.

In sum, Cox was expressing his anger about the charge but realized that he could do nothing about it. In these circumstances, I would find no violation in Cox's remark.[2]

Register was an attempt by Noble to incite a basis on which to justify the discharge of Register.

[1] I agree with my colleagues on every other issue.

[2] Cox also expressed his anger to employee Register because of the latter's prounion views. He said that he would like to pick up a cinder block, lying nearby, and hit Register with it. The judge found that this was an expression of anger and not a threat. My colleagues agree with the judge. In explaning what they see as the difference between the statement to Register and the one to Husted, my colleagues surmise that Cox was reacting to a comment by Register that he would not mind seeing Cox put in the gutter if that was what it took to get what Register wanted in the way of pay. However, the judge found that Cox was expressing his displeasure with Register's prounion attitude. The judge found no violation because Cox had no intention of hitting Register with the cement block and Register knew this. Similarly, with respect to the remark to Husted, the judge found that Cox had no intention of threatening Husted and that Husted knew it. I would adopt both findings. My colleagues, somewhat inconsistently in my view, adopt the one finding but not the other.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

In recognition of these rights we notify our employees that:

WE WILL NOT unlawfully interrogate employees about their union activities.

WE WILL NOT threaten plant closure because of our employees' union activities.

WE WILL NOT threaten to blackball employees who support the Union.

WE WILL NOT solicit employees' assistance to obtain employee withdrawal of union authorization cards.

WE WILL NOT solicit employees to sign petitions to withdraw union authorization cards.

WE WILL NOT threaten employees with physical harm because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

All our employees are free to become or remain, or refrain from becoming or remaining, members of a labor organization.

COX FIRE PROTECTION, INC.

E. Walter Bowman, Esq., of Tampa, Florida, for the General Counsel.

William E. Sizemore, Esq. (Thompson, Sizemore and Gonzalez), of Tampa, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me in Tampa, Florida, on March 26, 27, and 28, 1990. The charge was filed by Sprinkler Fitters U.A. Local 821, AFL–CIO[1] on May 17, 1989,[2] and complaint and amended complaint issued on August 31 and February 7, 1990 respectively. The amended complaint alleges violations of Section 8(a)(1) and (3). More specifically, it alleges that Cox Fire Protection, Inc.[3] violated Section 8(a)(1) of the Act by unlawfully interrogating and threatening employees, soliciting employees' assistance in obtaining employee withdrawal of union authorization cards, soliciting an employee's signature on a petition seeking to withdraw union authorization cards, creating the impression of surveillance, inflicting bodily injury on an employee, attempting to instigate a physical confrontation with an employee, and implying that it would be futile for the employees to select the Union as their bargaining representative.

The amended complaint also alleges that Respondent violated Section 8(a)(1) and (3) by first suspending, then later causing the termination of employee Frank Husted. The amended complaint seeks a bargaining order.

Respondent, in its answer, admits to interrogating a limited number of its employees but otherwise denies the commission of any unfair labor practices. Affirmatively, Respondent alleges that the authorization cards relied on by the General Counsel to demonstrate majority support of the Respondent's employees for the Union were tainted as a result of supervisory involvement in their solicitation.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT[4]

The Unit Question

The parties stipulated at the hearing that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

> All sprinkler fitters, sprinkler fitter apprentices and sprinkler fitter helpers employed by the Employer at its 8602 Temple Terrace Highway, Tampa, Florida facility, but excluding all office clericals, professional employees, engineers, managerial employees, guards and supervisors as defined in the Act.

The parties differ, however, as to whether fitter foremen should be included in the unit. Respondent contends that they should be excluded as supervisors within the meaning of Section 2(11) of the Act. The General Counsel asserts that they should he included as rank-and-file employees.

Ronald Cox and Kevin Rostetter own the Company and are alone at the top of Respondent's managerial hierarchy. They are the bosses and everyone answers to them. Because of their many duties, however, they are unable to visit the Company's various jobsites as often as needed. Cox and Rostetter are admitted supervisors.

Clifford Noble is the field superintendent. Respondent hired him because Cox and Rostetter were too busy to directly oversee the work in progress at the various worksites. As superintendent, Noble supervises all employees. Each morning, Respondent's employees meet at the shop and Noble tells the employees where to go, what to do, and what equipment to take with them. The employees usually work in crews of from two to six and Noble determines the number and makeup of each crew and which foreman should be in charge. He also instructs the foreman where he wants the fitters and helpers in that foreman's crew to work. Instructions are that explicit. After receiving their instructions from Noble, the foremen obtain the blueprints for the particular job assigned to each of them, gather their crews who then load the trucks, and then ride to their jobsites in the company truck personally assigned to them.

After giving the employees their instructions at the regular morning meeting, Noble goes out into the field and visits as many jobsites as he is able. Depending on the number of jobsites going at a particular time, the size of the job, and its distance from the shop, Noble visits a site, sometimes everyday, sometimes only twice per week. These visits, which do not last the entire day, are made to determine the amount of progress achieved, so that the Company can send out its monthly invoices based on the percentage of work completed, and to check up on the accuracy of the employees' daily timesheets.

Occasionally, problems do arise at the jobsite, a change in the plan, or a deviation from the blueprint, necessitated, perhaps, by a conflict with the plans of another contractor. On these occasions, the foreman on the job will call and consult with Noble on the problem, in order to obtain directions before making any change in the specifications. If the change results in the need for additional material or man-hours, the foreman will make note and so report. If Noble is unavailable, the foreman will consult with Cox or Rostetter.[5] In cases where a problem arises following installation, Noble will decide whether the job will have to be redone.

At the end of the day the various crews return to the shop, report their progress to Noble, and submit their timesheets. At this time, Noble advises them what they will be doing the next day.

At the jobsite, Respondent's employees usually work in crews consisting of between two and six workers. There may be one or more crews at a jobsite, each crew independently working on a particular job. The foreman or foreman-fitter

[1] The Union.

[2] All dates are in 1989 unless noted otherwise.

[3] The Respondent or the Company.

[4] The complaint alleges and the answer admits that the Board has jurisdiction here and the Union is a labor organization within the meaning of the Act.

[5] Foreman Lawrence testified that he makes changes on the job without first obtaining permission from his superiors. I find that he could do so with regard to minor changes but not where costs were affected. In either case, Lawrence has to advise his supervisors of any changes at the end of the day.

is in charge of the job and is assisted by one or more fitters or helpers. In situations where there are several crews working at a single jobsite, one foreman acts as leadman or pusher for the entire jobsite but has no authority over the other foremen insofar as the other foremen's specific jobs are concerned.

The foremen act as conduits, communicating information obtained from the general contractor's superintendent to Noble or Cox. They attend foremen's meetings, usually held in the general contractor's trailer, where the general contractor, once per week, lets the foremen of the various trades know what work he intends to achieve in the forthcoming several days. Thus, coordination and scheduling problems are worked out among the carpenters, electricians, sprinklers, and other trades. The information obtained at these meetings are duly reported by the foremen in charge to Cox and Noble.

Foremen are responsible for ordering and receiving materials at the jobsites. Receipts are turned in to the office at the end of the day.

During the time period material, Respondent employed 16 employees—6 foremen-fitters, 4 fitters, and 6 helpers. The amount of time a foreman works with his tools as opposed to performing foreman's duties depends on the size of the job and the number of crews with which he is working. Usually a foreman works 80 percent of the time hanging pipe and is expected to produce about as much as the fitters. In more unusual situations where there are several jobs at the same worksite, and one of several foremen is in overall charge, he will not do much manual labor himself.

Foremen are not always assigned to jobs as foremen but are sometimes, especially during slack periods, assigned as fitters to work for other foremen. Whenever this occurs, usually the foreman already on the job remains foreman and the newly arrived foreman operates as a fitter, hanging pipe. The foremen working as fitters suffer no decrease in wages. On one occasion, a foreman left the project and a fitter took over his duties. To this extent the jobs of foremen and fitters are interchangeable.

Similarly, there is a fine line between the duties of the fitters and the helpers. The primary duty of the fitter is to hang pipe, and of the helper to hand things up to the fitter on the ladder. Sometimes, however, they trade jobs because it is hard to sit and pull on heavy wrenches all day long. After a time, the helper will get up on the ladder and the fitter will hand things up to the helper who is handling the wrench.

Each morning Noble assigns the foremen to their jobs, and the fitters and helpers to their foremen. He may also assign the fitters and helpers to particular areas at the jobsite and to particular work. Precisely how that work is performed is more under the immediate guidance of the foreman than under his supervisory direction. On one isolated occasion, Cox told one foreman to put the men to work wherever he wanted, but this incident was an exception.

Although the fitters are assigned to work under foremen, both follow the assignments received from Noble each morning, and both must be certain to perform their tasks in accordance with the plans, blueprints, and specifications.

The pay scale for employees who work for Respondent depends, in part, on what they negotiate at the time of hire and, in part, on their classifications. At the time material, foremen were receiving an hourly wage between $8.50 and $10; fitters between $5.50 and $7; and helpers between $4.50 and $5. Other than the difference in pay scale, the foremen receive no benefits not received by the fitters and helpers except that they are permitted the use of a company vehicle to go to and from their homes to and from work.

Foremen have no authority to hire employees[6] and play no role in the hiring process. Nor do foremen have the authority to fire. Ronald Cox testified that if a foreman did not want a particular helper on his crew because of a personality clash, he had the authority to fire that helper without first talking to Cox. He added that he would not, in such a case, overrule the foreman's decision and hire the helper back the next day. He added, however, that he, Cox, is ''still the top guy in the company and I would still like to know what is going on.'' Cox testified, further, that although it is not a requirement, he likes the foremen to tell him before they fire anyone. He stated that he always has the foreman send the employee with whom he is displeased to the shop because he likes to hear both sides of a story.

Several foremen testified concerning their authority to fire. Frank Husted testified that he had no such authority implying, of course, that he had never been told he had the authority to fire anyone. Daubrey Lawrence testified that he was never told anything about his authority as foreman, that he knew he was just a working foreman, basically running the job of installing sprinkler systems. He stated specifically that ''the foreman is not the guy that fires,'' that he had no such authority. Foreman Lawrence DiBlasio testified that he has never dismissed anyone but understands that foremen do, in fact, have that authority. DeBlasio cited an incident which will be discussed infra.[7] Foreman Brian Crawford testified that, as foreman, he had authority to terminate employees and, in fact, did so in the case of his roommate and best friend, Kevin Holloway. Crawford, in his testimony, related that Holloway had failed to show up for work one morning and had been late on several occasions. Crawford went to Cox, reported these facts to Cox and told him that he would like to have Holloway terminated. When Holloway called the shop that day, Cox told him Crawford had terminated him. Crawford's testimony is supported by documentation, a payroll change notice indicating the discharge of Holloway, effective March 23, 1988, authorized by Crawford on the same date and approved by Cox 2 days later. Crawford testified that it was his usual practice, when he wants to fire someone, to first go to Cox.

Shortly after Holloway was fired, he was rehired as a welder. Respondent needed a welder and Crawford knew that Holloway had done some welding in school. Apparently, though it is not clear from the record, Crawford advised Cox

[6] Before Frank Husted was hired, he advised Respondent that he had his own helper; if one were needed. A week or two after Husted was hired and working as a fitter, not yet as a foreman, he told Cox that he had an acquaintance, Scott Frey, who was ''a good kid,'' who needed a job. His friend was hired as his helper, both working under their foreman, Brian Crawford. Since Husted was not a foreman at the time, the incident sheds no light on the authority of foremen. In another incident, an employee who had been laid off by Respondent, showed up at the jobsite where Husted was foreman. Husted called Cox and told him that the employee was there. Cox replied that the employee was laid off. Husted argued that he could use him, that because he was already at the jobsite, Cox should let him work. Cox refused. Clearly, Husted had no authority to hire or effectively recommend it.

[7] The Crawford/Holloway incident.

of Holloway's welding experience and he was brought back in that capacity. As it turned out Holloway's welding was unsatisfactory and 2 to 3 weeks after his firing, he was put back in the field as Crawford's helper.

Ronald Cox testified that Frank Husted's friend and helper, Scott Frey, worked for him for only 1 month. This was at Port Charlotte. According to Cox, Husted had just gotten started and was doing poorly, not getting a lot of work done, so that Cox ''got on his case.'' Husted explained that Frey was ''a green helper,'' just starting in the trade, and did not know much, that he had to train him. Although Cox accepted Husted's explanation, there was no improvement in Husted and Frey's production for the next 2 or 3 weeks. Then, according to Cox's testimony, one morning about February 1, Husted arrived at the shop without Frey and when Cox asked Husted where Frey was, Husted replied that he had fired Frey, that he ''just wasn't right for this business.''

Husted, in rebuttal, denied that he had terminated Frey or anyone else. He testified that Frey, at the time, was going to school nights in Tampa and that when he heard that Husted and he might be transferred to Orlando, he quit rather than accept the transfer which would interfere with his education. Husted testified that he told Cox these facts and that he played no role in Frey's termination.

I credit Husted's version of the facts surrounding Frey's quitting his job. First, when Frey left the employ of Respondent, Husted was still a fitter working for Crawford at Port Charlotte with no authority to fire. Second, Husted was transferred to Orlando shortly after Frey left, so that the timing supports Husted's version of the facts. Third, Cox testified that before any terminations occurred, it was his policy to be told beforehand, so that he could hear both sides and this alleged sudden unilateral action on Husted's part was not only contrary to Cox's stated policy but astonishingly drew no objection from Cox. Finally, Respondent offered no documentation to support Cox's version of the circumstances surrounding Frey's termination, as was offered in connection with other discharges.

The last incident cited in connection with the alleged authority of foremen to fire employees was described in Cox's testimony concerning Foreman Hal Mathews and his helper, Richard Gunter. Cox testified that Mathews fired Gunter claiming that Gunter was not working out on his crew. Mathews filled out a payroll change notice with an employee termination form attached, noting that Gunter was discharged effective April 6 for the reason that he was too slow in the field. According to the document, Mathews authorized the discharge, but neither Cox nor any other member of upper management approved it.

Cox testified that he did not approve Gunter's discharge, but rather moved him into the shop and that is why he did not sign the payroll change notice in the space provided for his approval. In short, Cox refused to approve Mathews recommendation.

Cox's testimony to the contrary notwithstanding, I find that foremen do not have the authority, independently to discharge nor even, effectively, to recommend discharge. As the overseer of the work and work habits of employees on their crews, foremen are in the best position to determine whether or not their crewmembers are doing well on the job. They, as foremen, are expected to present to Cox, their opinions with supporting evidence. Cox then investigates further, attempting to hear both sides of the story, and reaches an independent conclusion on whether or not to retain the particular employee. As often as not, he will not agree with the foreman.

Thus, Cox chose to retain Gunter though Mathews would have had him discharged. On the other hand, Cox chose to discharge Holloway when Crawford, angry with his roommate, suggested he do so. However, in the latter case, I find that because employees report to the shop each morning before proceeding to the jobsite, Cox was well aware of Holloway's record of absences and tardiness without having to be told by Crawford. Thus, the decision to discharge Holloway could have been and, in fact, was arrived at by Cox, independently by simply referring to the timesheets, following Crawford's reminder and suggestion.

To reiterate, decisions to hire and fire are made independently by Cox, or other members of upper management, based on information obtained from foremen and from other sources, and foremen do not have authority to hire or fire, or effectively to recommend such action.[8]

The record is clear that foremen have no authority to transfer employees from one project, job, or area to another. On the other hand, Cox testified that it frequently happens that a foreman complains, for one reason or another, that he no longer wishes to work with a particular individual anymore and requests that he be taken off his crew. Cox stated that in such cases, he honors those requests. Similarly, a foreman may reject, beforehand, an employee whom he does not want on his crew.

I do not find such situations necessarily to be indicia of supervisoryship. Rather, I would find this system merely to be an attempt by management to keep working conditions as harmonious as possible.

Respondent maintains no formal system whereby foremen issue written disciplinary notices, reprimands, or warnings. Husted testified that he had no authority to discipline, reprimand, or warn his crew members. In general conversations with his superiors, he would give his opinion as to whether or not they were doing well and his superiors would decide what to do, if anything. Foreman Lawrence also testified that he had no authority to issue reprimands or warnings or to discipline crewmembers. He volunteered that if an employee did not do as expected, he would suggest that that employee be moved to another crew but added that such a situation had never arisen while he was foreman with Respondent's Company. Foreman DiBlasio agreed that no formal written systems of warnings existed but testified that if he felt a member of his crew was not performing adequately, he would tell him so and threaten to get him removed from the crew. There is also testimony in the record that Foreman Crawford verbally criticized one of his crewmembers.

I find that foremen do not have authority to formally discipline, reprimand, or issue warnings to their crewmembers but may criticize them if they fail to perform their tasks properly. This is not sufficient to support a finding that they are supervisors.

The record is clear that foremen cannot grant wage increases. The question is whether they can effectively recommend them. With regard to this subject, Cox testified that wage increases are granted on the basis of verbal rec-

[8] *Phelps Community Medical Center*, 295 NLRB 486 (1989).

ommendations or written evaluations. He noted that written evaluations do not get done regularly because of a lack of clerical support. According to Cox, written evaluations are only done as a result of a foreman's wanting a fitter or a helper to get a raise because he is doing a good job. In that case the foreman will ask for an employee progress report form which he fills out and submits to management. The form contains 16 descriptions of the employee's work habits, e.g., attendance, initiative, speed, accuracy, personal appearance, etc., but no space to insert a recommendation for a wage increase.

In support of Respondent's position that the foremen have authority to effectively recommend employees for wage increases, Cox testified to just two such incidents. On one occasion Foreman Lawrence advised Cox that employee Register was doing a good job and ought to get a raise. Cox told Lawrence that Register was missing work once or twice a week and asked, ''How can you give a man a raise and tell him he is doing a good job when he doesn't come to work?'' Lawrence's recommendation proved ineffective. After Register was told he would not receive a wage increase and the reason, he improved his attendance and a month or a month and a half later he received a raise. According to Lawrence, Register's wage increase was not based on his recommendation. No paperwork was involved.

The second instance of a foreman allegedly effectively recommending a wage increase was testified to by Cox and Crawford, and involved, once again, roommates Crawford and Holloway. As noted supra, Crawford signed Holloway's discharge notice. On May 20, 1988, shortly after Holloway returned to the field as Crawford's helper, he was granted a 50-cent-per-hour wage increase. The reason for the wage increase is not clear from the record. However, it was accompanied by one of just two employee progress reports, submitted by Respondent to support its position that foremen effectively recommend wage increases. This document, an evaluation of Holloway's work, was filled out and signed by Crawford. At the bottom of the document is a note, also dated May 20, 1988, signed by Cox, directing his secretary to have Holloway granted a 50-cent increase in wages.

Crawford testified that as a result of his evaluation, Holloway received the 50-cent-per-hour increase. He added that whenever a foreman feels that an employee should be granted a wage increase he would request an evaluation form from Cox, fill it out, and submit it to Cox, who decides if he should grant a wage increase and, if so, how much. Thus, Crawford's testimony parroted that of Cox. However, when examined as to whether other foremen followed the same procedure, Crawford stated that he did not know. Under further examination, Crawford admitted that he had not brought in a more recent employee progress report because he had not submitted one since Holloway's, almost 2 years before. In fact, he admitted, that was the only such form he had ever filled out. His incredible explanation for this fact was that he had never had a helper good enough to recommend for a raise.

Crawford specifically denied that he and Cox decided to let Crawford fill out this form on this single isolated occasion in order to accommodate him, to make it appear to his best friend, that Crawford was instrumental in obtaining a wage increase for him, 2 months after getting him fired. Despite Crawford's denial, I believe this is exactly what happened. The form, it should be noted, bears one space for a signature, that of the foreman making the evaluation. There is no printed portion on the form providing for a recommendation for a raise and no space for an approving officer's signature. Similarly, there is no space for the signature of the employee being evaluated. Despite the lack of space for such entries, Cox wrote his message at the bottom of the page providing for Holloway's raise, and the document was shown to Holloway and he signed it.

I conclude that the document submitted does not reflect a standard practice claimed to be in existence at Respondent's place of business, whereby a foreman fills out an employee progress report, for the purpose of recommending an employee for a raise. Rather, the document appears to be part of an isolated incident, peculiar to the set of facts involving the discharge of Holloway, his rehiring and the granting to him of a wage increase. The document reflects the special relationship between two close friends and an accommodating boss.

I conclude that Respondent's foremen do not have the authority, in the ordinary course of business, to effectively recommend wage increases. I find this conclusion supported by the fact that Crawford never evaluated any employee nor recommended anyone for a raise except to the extent he was involved in the very special circumstances described immediately above; that Foreman Husted credibly testified that he never evaluated any employee for any purpose whatsoever; that Foreman Lawrence never wrote out any performance appraisals; and that Respondent offered only two[9] documents, both almost 2 years old, to support its claim that a formal employee progress evaluation system existed. If, indeed, there were additional employee progress reports in existence, Respondent would have offered them into evidence. I therefore draw the adverse inherence that no such documents exist and that none of the foremen ever submitted such documents or relied on such documents to seek wage increases for employees.

Foreman Husted and Lawrence both testified that they could not assign overtime or direct employees to work overtime, that overtime had to be assigned by upper management. Husted testified that on occasions when other trades were working overtime, he was required to call the shop and inform Cox of the circumstances and Cox would decide what was to be done. Both Lawrence and Husted testified that they never granted time off but if and when asked by an employee for time off, they would and did advise them to obtain permission from Noble or Cox.[10]

Husted credibly testified that he sometimes filled out a timesheet for his helper but did not maintain payroll records for his crew, rather everyone kept his own. Lawrence also

[9] The second document offered was also an employee progress report, this one dated June 2, 1988. In it, Foreman Kelly Childerish appears to be (footnote continued) evaluating his helper. There was no testimony concerning this document. Neither the foreman nor his helper testified. I do not rely on it as evidence.

[10] Employee Theresa Spaulding testified that her foreman, Brian Crawford, could independently grant time off and make other work related decisions without first obtaining permission from his superiors. No foundation was laid for this testimony and no evidence in the record indicates the basis for her testimony. Crawford did not testify concerning these matters, and I do not rely on Spaulding's testimony.

testified that he did not keep payroll records or timecards for employees. Cox confirmed the fact that sometimes helpers would fill out their own timesheets.

Both Husted and Lawrence testified that they did not entertain grievances or complaints. Both agreed that employees with such problems would be directed to Noble or Cox.

From the above-described testimony and documentary evidence, I conclude that Respondent's foremen are not supervisors within the meaning of Section 2(11) of the Act and are eligible to vote in any representation election conducted by the NLRB.

The Unfair Labor Practices

The Respondent has been engaged as a sprinkler system contractor in the construction industry since 1985. In April 1989, one of its employees, Daubrey Lawrence, decided to attempt to organize the employees on behalf of the Union. He talked to several of them concerning the benefits of union representation and membership and asked them to sign union cards.

Lawrence obtained the cards from the Union, distributed them, and obtained the first signatures on April 24 from employees Register and McCord while on the Westside Crossing project in Orlando. Lawrence collected the cards and returned them to Mike Woods, the union business agent, who was also at the jobsite.

On April 28, Lawrence met with and obtained signatures on union cards from employees DiBlasio and Husted and got around to signing one himself. He also invited these two employees to meet the following morning for breakfast at the Holiday Inn in Tampa with agents of the Union who supplied them with pamphlets and other materials. Their signed cards were returned to the Union at that time. Apparently, arrangements were made at this meeting for another meeting to be held with other employees the following Monday, May 1, at Sunny's Barbeque near the Westside project in Orlando.

At noon, that Monday, Union Agents Chaires and Woods met with seven of Respondent's employees. Among those in attendance were employees Husted, Dennis and David Nelson, Daniel Barrow, Lawrence, DiBlasio, and Register. Lawrence was responsible for the attendance of some or all the other employees. Those employees in attendance, who had not already signed cards, did so at the May 1 meeting. Arrangements were apparently made for another meeting the following day. Thereafter, Lawrence asked additional employees to attend that meeting.

At noon, May 2, 10 employees showed up at the same restaurant to meet with Chaires and Woods. Chaires addressed those present and explained the benefits of union representation. He answered questions and either he or Lawrence distributed authorization cards to those who had not already signed. Crawford, Spaulding, and Davis signed cards and returned them to Chaires. With these additional signatures, a majority of Respondent's employees had signed cards. Arrangements were made for another meeting scheduled for the following day at the same place.

On the evening of May 2, Theresa Spaulding arrived at home after work and told her husband that she and some of Respondent's other employees had signed up with the Union that day at lunchtime. He told her that he did not think that what she had done was a good idea, that it was wrong, and that she should call Cox and tell him what she had done. He also advised her to try and get her union card back.

Following her conversation with her husband, Spaulding called her brother and told him that she had signed a union card. He advised her that what she had done was one of the biggest mistakes of her life and that she should call Cox and tell him what she had done. Just as her husband had done, her brother told her that she should try to get her card back.

Following these two conversations, she called Cox and told him how the employees had met with the union organizer at lunch that day and had all signed cards. She named the employees involved and apologized for her participation. Cox testified that he was shocked and upset at the news he received from Spaulding that his employees were organizing. Spaulding's call was the first indication he had received concerning the Union's campaign.

Meanwhile, Brian Crawford arrived home on the evening of May 2 and told his father that he had signed a union card that day. His father called him an idiot and explained why he felt that Crawford had made a mistake.

After her call to Cox, Spaulding called Crawford, her foreman, and admitted to him that she had informed Cox about the meeting and signing of cards. Crawford, in turn, told Spaulding of his father's reaction and advised her that he intended to call Cox himself.

After speaking with Spaulding, Crawford called Cox, but no one answered. He therefore left a message on Cox's answering machine. When Cox, shortly thereafter, discovered the message on his machine, he attempted to call Crawford but found his phone was busy. He therefore walked over to Crawford's home and the two discussed the situation.

Crawford volunteered to Cox that he had signed a union card and apologized for having done so. He said that he and Spaulding intended to get their cards back and would try to get the other card signers to do the same. According to Crawford, although Cox appeared agitated and upset, he made no threats. After the brief conversation, Cox said that he had to go and that he would see Crawford in the morning.

On the way home from Crawford's house, Cox stopped off at DiBlasio's home. Cox asked DiBlasio if he had heard from either Spaulding or Crawford. DiBlasio replied that he had not, so Cox simply asked him outright if he had signed a union card and DiBlasio admitted that he had. Cox then, in a calm and detached manner, according to DiBlasio, explained to DiBlasio that he could not afford to pay union wages. He then left.

Husted credibly testified that on the evening of May 2, about 7 p.m., Cox called him at his home. Cox seemed upset. He asked Husted what was going on. Husted asked, in turn, what Cox was talking about. Cox charged that he had heard that all the employees at the Orlando site had signed union cards and asked if Husted had also signed one. Husted admitted that what Cox had heard was true and that he had, in fact, signed a card himself. Cox then informed Husted that he had already met with his partners and they had decided that nobody would receive a unionized check; that the company would close its doors before it would open a union shop. When Cox next asked Husted why he had signed a union card, Husted replied that he wanted to hear what the Union had to say. Cox then asked Husted to get his union card back and added that if the ''union stuff'' were dropped then, nothing would come of it, but if it were

pushed, Cox would see to it that none of the employees would work nonunion again.

Cox testified that he could not remember whether he had called Husted on the evening of May 2 but would not deny it.[11] As noted, I credit Husted's testimony and find that the conversation occurred just as he described it.

After Cox hung up, Husted called Lawrence and told him about Cox's call to him. This was the first of six calls Lawrence received that evening. According to Lawrence, the first thing that Husted said was, ''The shit hit the fan.'' He went on to explain that Cox had called him and threatened that he would not pay a union dollar, that he would close the doors before he would do so, that he would blackball, with other nonunion companies, every employee who had signed a union card. Thus, Lawrence's testimony concerning this phone call would tend to support Husted's version of Cox's call to him.

The second call Lawrence received that evening was from Cox, just about 5 minutes after he was done talking with Husted. According to Lawrence, Cox sounded shook up and, at the same time disgusted. He asked Lawrence what was going on, and when Lawrence played dumb, Cox repeated the question two or three times. Finally, Cox stated that he knew about the Union trying to get into his company. He told Lawrence that he could not afford to pay union scale because he was a little guy, was not big enough to pay a union payroll, and would shut his doors before he would do so. He then threatened to blackball Lawrence. Before hanging up and saying he would see Lawrence in the morning he instructed him to get back his union card.

Cox admitted calling Lawrence on the evening of May 2 and questioning him as to what he knew about the Union and whether he had signed a union card. He denied, however, threatening to blackball him from the industry and likewise denied threatening to close his shop because of his employees' going union.

Lawrence next received a call from Register. Register discussed with him an earlier call he had received from Cox. Although Lawrence, Register, and Cox all testified concerning these two calls, the testimony is sketchy and unreliable. To be noted, however, is the fact that Register did not ask Lawrence for the return of his union card as did other employees who called later that evening.

The next call received by Lawrence that evening was from DiBlasio. DiBlasio told Lawrence that Cox had just been to his home and was crying and upset about the Union. He related that as he and Cox were discussing the Union, Cox apparently gestured toward a block lying on the ground and said that he ought to pick it up and hit DiBlasio along side the head because of his going union. DiBlasio told Lawrence that he backed up for fear Cox was really going to hit him.[12]

Lawrence went on to state that he was going to have to back out of the union organizing campaign because he felt sorry for Cox—his being upset and crying. He then asked for the return of his union card. According to Lawrence, DiBlasio told him on this occasion that Cox had also threatened to blackball him.

After his conversation with DiBlasio, Lawrence received calls from Crawford and Spaulding.[13] Both asked for their cards back, explaining that they felt sorry for Cox.

The following morning, May 3, according to Lawrence and Husted, when the employees arrived at the shop, there seemed to be a lot of tension in the air. Cox said nothing about the Union, however, and the crew left the shop, as usual, for the Orlando jobsite. However, after Husted finished loading his truck, and just as he was about to leave, Cox remarked to him, ''Don't waste all afternoon at Sunny's.'' Cox denied that there was any tension in the shop that morning and testified that he knew that morning about the union meeting scheduled for that day, at lunchtime, at Sunny's because a few of the employees, including Husted, himself, had told him about it. He admitted also that he made the remark attributed to him by Husted but maintains that it was meant as a joke because he was under the impression that the employees were going to ask for their cards back during the scheduled luncheon meeting with Chaires. I credit Cox with regard to this matter and find no violation.

Lawrence was initially unaware that Cox was going to visit the Orlando jobsite that morning and did not expect him because ordinarily Cox would advise his employees beforehand and did not do so on this occasion. Later that morning, however, he learned that Cox was going to be coming out to the job so he advised Chaires about it. He also told Chaires that Cox and Noble were watching everything the employees were doing, that the employees were scared, and that the meeting should be canceled. Chaires agreed. Cox arrived at the jobsite sometime that morning. He remained for about an hour and a half, then left. The meeting was not held at Sunny's. Cox did not visit Sunny's, nor is there any reason to believe that he intended to do so. Before Cox left, Lawrence advised him that the union meeting had been canceled.

Chaires filed a petition for election, along with the signed union cards as a supporting showing of interest, with the Tampa Regional Office, shortly after noon, on May 3. That evening, Spaulding called Chaires and asked him if there was some way she could get the cards back. Chaires replied that he had already turned the cards over to the Board and it was out of his hands. DiBlasio, Dennis Nelson, and perhaps other employees called Chaires to request that he return their cards but in each case he told them that he could not do so.

Based on the calls he received from these employees Chaires, later that evening, made calls of his own to other employees to determine what was going on, that people were calling him to have their cards returned. He concluded that there was no longer support for the organizing drive, that although Lawrence, Husted, Register, and Barrow still professed support for the Union, the others had withdrawn their support. He was convinced that his majority was disseminated and made no effort to revive it. Similarly, none of the employees made any effort to revive the organizing campaign.

On or about May 4 Respondent would have received a copy of the petition for an election and on May 5, Spaulding decided to try to get the union cards back and to avoid an election if possible. She figured that if she wrote up a peti-

[11] Cox did denied that he ever threatened to close the shop or to blackball employees because of their union activity.

[12] At the hearing DiBlasio denied that Cox had ever threatened him with any sort of physical abuse. I credit DiBlasio's denial.

[13] Spaulding denied calling Lawrence. I do not credit Spaulding's denial.

tion and went around the shop and asked the other employees to sign it, they could get their cards back. Before actually drawing up a document, however, she asked Cox if it would be all right. Cox replied that he could not have anything to do with it but did not know if she could. She determined she would go ahead and try.

Because Spaulding was aware that Crawford too was in favor of getting the cards back, she sought his aid with the project. They drew up a petition together which read as follows:

> This is written notification of the following:
>
> 1. We the undersigned void all signature cards submitted to the union organizer.
> 2. We the undersigned refuse an election to consider unionization.
> 3. We the undersigned will not attend an election to consider unionization should one be scheduled.

Below this message were the typed names of 10 employees together with their social security numbers which Spaulding got from the employees listed or from the secretary who basically served management and other white collar personnel in the office. The document provided a signature place for each employee listed.

After drafting the document, Spaulding and Crawford gave the draft to the secretary to type. After it was typed, both Crawford and Spaulding signed the document. They then went around the shop, showed the employees listed on the document the petition, and told them that it would be in the office on the secretary's desk, and would they please take a moment to read and sign it.

The names which Spaulding included on the list were all of the field people she knew to be employed and whom she believed to have signed union cards. When she left that morning to go to the worksite she left the document with the secretary to later send to the Union and never saw it again.

Of the 10 employees listed, 7 signed the petition. Husted, Lawrence, and Register did not. When showing the petition to the employees, Spaulding and Crawford advised them that they could sign it or not. Register told Spaulding to get it out of his face.

Cox denied having anything to do with the petition. Register, however, credibly testified that one afternoon, in the shop, after all the employees had returned from the field, Cox asked him if he had signed the sheet to get his card back. Register replied noncommittally that Cox had nothing to worry about; that he was probably going to win anyway. I credit Register's testimony with regard to this incident.

Sometime during the week of May 8, one morning before the employees left the shop for the jobsite, Noble and certain other employees were waiting for Lawrence and Register to report for work. Noble was pacing by the door and asked rhetorically, ''Where are them union fuckers.'' Noble denied making the remark.

Paragraph 8(a) of the complaint alleges:

> Respondent, acting through Cliff Noble:
>
> (a) On or about the week of May 8, 1989, at the Employer's shop in Tampa, created an impression among its employees that their union activities were under surveillance by Respondent.

I find that by the week of May 8 everyone knew who were prounion employees and who were not. There was no reason for anyone to engage in surveillance or to give the impression of surveillance and Noble did not do so by making the remark attributed to him. Though I find he made the remark, I find no violation.

On or about May 10, after the employees returned to the shop from the jobsite, after work, Noble and Register were engaged in conversation. Noble mentioned that the Company had just spent $4000 on a lawyer[14] and that he should take Register out and get him drunk so that he would miss work the following day and Noble could then fire him. Noble denied making this remark. I find that although he made the remark, Noble had no intention of taking Register out and getting him drunk. The remark was pure badinage, not a threat, and not violative of the Act.

On May 11, Lawrence quit his job with Respondent. The complaint does not allege his departure to be a violation of the Act.

On Friday, May 12, between 2 and 2:30 p.m., Noble came out to the Orlando jobsite where several of Respondent's crews were working. Although 3:30 was the usual quitting time, on Fridays the practice was to stop working at 2:30 p.m. to enable the employees to return to Tampa, to get and cash their checks early. On this occasion, however, Noble advised Respondent's employees, including Husted and Register, working as a crew, that they would have to work until 3:30 p.m. Husted and Register had already loaded their truck and were ready to leave. Noble took the position that there was still work to be done and an hour left of working time. Register, believing that Noble was looking for a pretext for firing them, said, ''Cliff, the only reason you're doing this is because you don't want us to vote in [the election].'' Noble, whom the record indicates had had fights with employees in the past, moved toward Regigter, shoved him several times and said, ''Hit me, Mickey. Hit me.'' Register just walked away.[15] Noble threatened to fire Husted and Register if they left early. They did so anyhow but were not terminated. The other crews worked until 3:30 p.m.

With respect to this incident, paragraph 8(c) of the complaint alleges:

> Respondent, acting through Cliff Noble:
>
> (c) On or about May 12, 1989, at the Employer's jobsite in Orlando, inflicted bodily injury upon an employee and attempted to instigate a physical confrontation because of the employee's union activities.

I do not believe this incident was related to the union activity of the employees involved. First, it was Register who brought up the subject of the Union, not Noble. Second, there was no union meeting or other activity scheduled for that afternoon from which Husted and Register were being kept. Third, all the employees were asked to work the extra hour, not just prounion employees. Fourth, if Respondent scheduled the extra hour of work in order to establish a pretext for firing Husted and Register, in the event they refused

[14] Cox had hired a labor attorney about this time. Reference to the attorney, which appears in Register's affidavit, clearly places the statement in the context of union activity.

[15] Noble's version of the incident, completely different, is not credited.

to work and left early, Respondent's plan worked perfectly for, indeed the two known prounion employees left early, but were not terminated. Finally, the simple explanation is that Noble, an excitable individual by all accounts, lost his temper when Husted and Register refused his order to work until 3:30 p.m. I find no violation here.

On Friday, May 12, Husted was scheduled to take a pump to the jobsite and pressure test the pipe system. He asked Noble which pump to take because some of them were not working. Noble indicated which one to take. When Husted arrived at the jobsite and tried to operate the pump, he found that it would not work. He called the shop and was told to fix the pump. After spending 2 hours trying to fix the pump, Husted called the shop again and was sent to work at another location.

The following Monday, May 15, when Husted reported to the shop, Noble asked him if he had tested the system. Husted replied that he had not done so because the pump was not working. When Noble began to shout at Husted, the latter pointed out that Noble had told him to take that particular pump. Noble denied this and Husted accused him of lying. After some additional argument Noble told Husted to go home. Husted appealed to Rostetter who was standing nearby, but Rostetter backed Noble and Husted left. During this altercation there was no mention of the Union.

Later that day, Husted called the shop to ascertain his situation and was transferred to Cox who told him that everything was straightened out and that he should report to work the following day. He did so but lost 1 day's pay due to the suspension.

During the telephone conversation between Cox and Husted, there appears to have been a total lack of animosity between them. Husted invited Cox and his family over to his home for a cookout. Later, he extended the invitation to several other employees.

I find the suspension of Husted by Noble the direct result of the pump altercation during which Husted called Noble a liar and Noble again lost his temper. If Cox were looking for a pretext to get rid of Husted, he might have relied on Husted calling his superior a liar. Instead, he smoothed things over and called Husted back to work.

On May 17 the Union filed a charge alleging the suspension of Husted and earlier incidents as violative of the Act and requesting a bargaining order as part of the remedy. The charge effectively blocked processing of the petition for election.

Husted had advised Cox, some time prior to Friday, May 26, that he intended to take that day off to take his family to Disneyworld. Because Friday was payday, Husted asked if he could pick up his check the evening before. Cox granted this request.

On Thursday, May 25,[16] after work, when Husted went to Cox's office to pick up his check, he found several employees there handing around a sheet of paper which was subsequently returned to Cox who then placed it on his desk. Husted asked what was happening and Cox replied that Husted knew. Husted pled that he did not know what Cox was talking about, at which point Cox stood up and said, ''This isn't a threat, but I want to kick your ass.''[17] He then told Husted that he was two-faced and a liar and that he did not even want to talk with him anymore. He told Husted angrily, ''Anything you have do do regarding work, you do it through Cliff Noble or Kevin or whoever. Don't talk to me anymore.'' Husted replied, ''Look, can I just get my check and I'll go?'' Cox replied, ''You'll get your check tomorrow.''

The sheet of paper that Cox had been passing around was the Union's charge against Respondent, filed May 17. It includes the allegation that Respondent suspended and/or terminated Husted because of his union activities.

Feeling the strain, not only between himself and Cox, but also between himself and the other employees present, Husted simply said, ''Okay.'' He then left.

The complaint in paragraph 7(c) alleges that Respondent, through Ron Cox, threatened an employee with physical harm. This paragraph cleary refers to Cox's statement, ''This isn't a threat, but I want to kick your ass.''

I do not consider Cox's statement to be a threat. By making this statement Cox was saying, in effect, that he was so angry, that he would like to physically hurt Husted but, for one reason or another, would not do so. And he did not. His expression of anger, which is all it was,[18] may have been tempered by his knowledge that to follow through with the action under contemplation would result in a charge of assault and battery, a possible civil suit and a violation of the Act. On the other hand, the fact that Cox is 5 feet 7 inches tall while Husted stands 6 feet 4 inches and weighs 260 pounds may have been a consideration in his giving Husted assurances that no such assault would take place. Whatever the reason, Cox made it clear to Husted, that he was not threatening him. I find no violation.

The following morning Husted came by and picked up his check from Cox. He asked Cox if he could have the following Monday off in addition to that day. Cox granted his request. Husted then left with his family for Orlando.

That weekend Husted met with Oscar Chaires and advised him that he no longer wished to continue working for Respondent. Chaires attempted to convince Husted to remain on the payroll but Husted declined.

On Tuesday, May 30, Husted did not appear at the shop as scheduled. Cox called him up and asked why he had not shown up. He assured Husted that he had not been fired. According to Husted, he told Cox that he did not want to come back to work because he felt he had been threatened. According to Cox, Husted said nothing about being threatened. Rather, he said that there was no problem between Cox and himself, but that he could not work for a drug addict, referring to Noble. I credit Cox as to the content of this conversation Husted did not work for Respondent thereafter and testified that the reasons included Noble's drug habit which, at times, adversely affected his attitude toward and treatment of the employees, Cox's threat, and the attitude of other employees toward him.

The complaint alleges that Cox threatened Husted with physical harm and that when Husted quit his job because of

[16] The incident here discussed was incorrectly dated May 18 in the complaint.

[17] Where Cox's version of this incident differs from that of Husted, the latter is credited. The four employees who witnessed the conversation all denied that Cox threatened Husted. They did not, however, deny that the above-quoted words were uttered.

[18] *Gem Urethane Corp.*, 284 NLRB 1349. (1987).

fear which was engendered by Cox's threat, his quit was tantamount to a constructive discharge. Because I have found no threat, however, I find no constructive discharge.

Toward the end of May, Cox visited the Orlando jobsite where Register was working above the ceiling on a ladder. Cox shook the ladder to let Register know that he was below, then engaged him in job-related conversation. Shortly thereafter, Register said that he would like to talk with Cox. Cox replied that there was nothing he could say to him, that if he said anything, it would just get him in trouble and he was afraid of going to jail. Register insisted that he would still like to talk to Cox alone, so the latter agreed.

Register climbed down off the ladder and they both walked outside. Register told Cox that he knew that Cox was upset with him but that he was still in favor of the Union. He explained that he had not seen his kids in a very long time and the money he would make in the Union would enable him to do so. He said that he also wanted the union benefits and insurance. Cox replied that he could never pay union wages nor union insurance,[19] because he could not afford it and still bid jobs the way he had been doing. He said he could not pay union wages and insurance and still get the work; he could not stay in business. Register said that he would put Cox in the gutter if that is what it would take to see his kids, meaning, according to Register's own testimony, that it did not matter if Cox lost everything he had, as long as Register got what he wanted. Cox, upset, replied, ''Fuck you!'' and pointing to a cinder block lying nearby, on the ground, added; ''I feel like picking that block up and hitting you in the head with it.''[20]

The complaint alleges, paragraph 7(d), that on the above-described occasion, Respondent through Ron Cox, informed an employee that he would never get insurance at Cox Fire Protection, implying that it would be futile or the employees to select the Union as their bargaining representative.

I find, however, that Cox's explanation concerning his inability to provide union insurance for his employees, couched, as it was, in economic terms, as to what might happen if certain events occurred, was merely the Employer's permissible mention of possible effects of unionization and not violative of the Act.[21]

The complaint alleges that Cox threatened Register when he said, ''I feel like picking that block up and hitting you in the head with it.'' I find it was not a threat but a statement reflecting Cox's displeasure and exasperation with Register's insistence on maintaining his prounion attitude. It was a hard-nosed, give-and-take argument. Cox had no intention of hitting Register with the cinder block and Register knew it. I see no violation here.

Conclusions

I find that Respondent, on May 2, acting through Cox, violated Section 8(a)(1) by interrogating employees DiBlasio, Husted, and Lawrence about their union activities for no apparent legitimate purpose while accompanying his interrogation of them with threats of various kinds.[22] Cox's threats on May 2 to close the plant[23] and to blackball employees who supported the Union[24] were likewise violative of the Act. Finally, Cox's solicitation of employees' assistance, on that date, to obtain employee withdrawal of union authorization cards was violative of Section 8(a)(1) of the Act.[25]

I find, with regard to Cox's solicitation of Register to sign the petition to withdraw union authorization cards, on May 5, that by this act, Respondent violated Section 8(a)(1).[26]

I have found that Respondent, through Cox, committed seven violations of Section 8(a)(1), six of them within the space of a few hours, on the evening of May 2, immediately after Cox heard of the organizing campaign that took place earlier that day that resulted in a majority of his employees signing union cards. Thereafter, Respondent committed no violations except for the minor incident of May 5. I do not consider these violations serious enough to warrant the granting of a bargaining order.[27]

The Effect of the Unfair Labor Practices on Commerce

The activities of Respondent set forth above, occurring in connection with its operation described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully interrogating its employees about their union activities, threatening plant closure because of its employees' union activities, threatening to blackball employees who support the Union, soliciting employees' assistance to obtain employee withdrawal of union authorization cards, and soliciting an employee to sign a petition to withdraw union authorization cards, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

[19] Cox denied making this statement, but I credit Register.

[20] Cox denied threatening Register on this occasion but was not examined as to whether or not he made the statement attributed to him.

[21] *Tri Cast, Inc.*, 274 NLRB 377 (1985); *Benjamin Coal Co.* 294 NLRB 572 (1989).

[22] *Sorenson Lighted Controls*, 286 NLRB 969 (1987).

[23] *M.P.C. Plating*, 295 NLRB 583 (1989).

[24] *299 Lincoln Street, Inc.*, 292 NLRB 172 (1988).

[25] *Times Wire Co.*, 280 NLRB 19 (1986).

[26] Ibid.

[27] *Christie Electric Corp.*, 284 NLRB 740 (1987); *Times Wire Co.*, supra.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

Continued

ORDER

The Respondent, Cox Fire Protection, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating employees about their union activities.

(b) Threatening plant closure because of its employees' union activities.

(c) Threatening to blackball employees who support the Union.

(d) Soliciting employees' assistance to obtain employee withdrawal of union authorization cards.

(e) Soliciting employees to sign petitions to withdraw union authorization cards.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its shop in Tampa, Florida, copies of the attached notice marked ''Appendix.''[29] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''